1969

L.A. Young Sons Construction Company v. State Tax Commission Of Utah : Brief of Plaintiff

IN THE SUPREME COURT
of the
STATE OF UTAH

L. A. YOUNG SONS CONSTRUCTION COMPANY,

Plaintiff,

vs.

STATE TAX COMMISSION OF UTAH,

Defendant.

Case No. 11467

BRIEF OF PLAINTIFF

Writ of Review to Review an Order of the State Tax Commission of Utah

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NATURE OF THE CASE

This is an original proceeding to review and to determine the legality of an order and decision of the State Tax Commission of Utah imposing a use tax deficiency against L. A. Young Sons Construction Company, a partnership, in the amount of $5,540.24.

DISPOSITION OF THE CASE BELOW

The plaintiff's petition for re-determination of the notice of tax deficiency was heard on October 25, 1968, and an order and decision denying that petition for re-

determination and imposing the deficiency was entered by the State Tax Commission of Utah on December 4, 1968.

NATURE OF RELIEF SOUGHT ON REVIEW

By this review plaintiff seeks a reversal of the December 4, 1968, decision of defendant.

STATEMENT OF FACTS

The defendant, State Tax Commission of Utah, has imposed a use tax upon the plaintiff, L.A. Young Sons Construction Company, under Section 59-16-3, Utah Code Annotated 1953, as amended. The plaintiff asserts that the transaction involved was "isolated or occasional" and that the exemption from taxability of isolated or occasional sales as provided for under Section 59-15-2, Utah Code Annotated, 1953, as amended, is applicable.

The facts in controversy were settled by written stipulation of the parties, and also by the introduction of uncontroverted affidavits. References in support of the material facts will be cited by the appropriate paragraphs of the stipulation (Stip. ....) and the affidavits by their page number in the record (R. ....).

The plaintiff was a Utah partnership and was engaged in the construction business during the year 1961

(Stip. 1). On or about August 25, 1961, plaintiff purchased certain used construction equipment from Amis Construction Co., an Oklahoma corporation. The sale was held at Atlantic City, Wyoming (Stip. 2) (R. 51).

The seller, Amis Construction Co., is an Oklahoma corporation with its principal place of business in Oklahoma City, Oklahoma. The regular course of business of Amis Construction Co. is the construction of highways, roads and bridges. Immediately prior to August 25, 1961, Amis Construction Co. was engaged in removing overburden at a mining site at Atlantic City, Wyoming. In the course of this contsruction job it used its construction equipment. Upon completing the job, it determined to sell some of the equipment used thereon in order to avoid the maintenance and transportation costs involved in taking the equipment back to the Company's main base of operations (Stip. 6) (R51). Amis Construction Co., therefore, conducted a sale of that equipment at the construction job site. The plaintiff went to Wyoming and purchased certain used construction equipment at that sale and entered into a Retail Installment Contract with the seller. L. A. Young Sons Construction Company later received a bill of sale of personal property from Amis Construction Co. (Stip. 6.). At the time of the subject transaction, Amis Construction Co. was not and never had been engaged in the business of selling construction equipment nor has it ever been involved in making retail sales (R51). In fact, Amis Construction Co.

does not now and never has had a sales tax license and does not purchase anything for resale (R55). Amis Construction Co. has existed for over fifty years either as a sole proprietorship, partnership, and finally in 1959 as a corporation. During this entire period of time, it has held only two equipment sales (Stip. 7) (R55). It does not depend on revenue from such sales for its income. The sale was in no way a part of its business (R55). Of the two sales of used construction equipment which Amis Construction Co. has held over its fifty year period of existence, one was the sale which is involved in the transaction with the plaintiff and the other was held in Topeka, Kansas, on the preceding day (Stip. 7).

Upon its purchase by L. A. Young Sons Construction Company, the equipment was transported into the State of Utah and was used in the plaintiff's construction business.

The defendant Commission held that the transaction between the plaintiff and Amis Construction Co. was not isolated or occasional and not exempt from taxation. It further held that had the transaction been isolated or occasional this exemption does not apply to an out of state transaction nor is it an exemption under the Use Tax Act (R60).

On April 26, 1967, the defendant assesed a use tax deficiency for the year 1961 against plaintiff in the

amount of $4,646.74 together with interest thereon, asserting that the tax deficiency is a result of the failure of the plaintiff to remit tax on an out-of-state purchase subject to the use tax (R33-34).

ARGUMENT

POINT I

THE SALE OF CONSTRUCTION EQUIPMENT BY ONE CONTRACTOR TO ANOTHER WHERE SUCH SALE IS NOT IN THE REGULAR COURSE OF ITS BUSINESS, IS AN ISOLATED OR OCCASIONAL SALE AS THAT TERM IS USED IN SECTION 59-15-2, UTAH CODE ANNOTATED, 1953, AS AMENDED, AND IS EXEMPT FROM A USE TAX.

Section 59-15-2 (e), Utah Code Annotated, 1953, as amended, states in part as follows:

> " . . . the term 'retail sale' means every sale within the State of Utah by a retailer or wholesaler to a user or consumer, except such sales as are defined as wholesale sales or otherwise exempted by the terms of this act; but the the term 'retail sale' is not intended to include isolated nor occasional sales by persons not regularly engaged in busi-

> ness, nor seasonal sales of crops, seedling plants, garden or farm or other agricultural produce by the producer thereof, or the return to the producer thereof of processed agricultural products, provided, however, that no sale of a motor vehicle shall be deemed isolated or occasional for the purposes of this act."

The transaction involved in this case was an isolated or occasional sale within the meaning of our Utah statute. This court determined in the case of *Geneva Steel Co. v. State Tax Commission,* 116 Utah 170, 209 P. 2d 208, that an isolated or occasional sale is one made by a person while not in the pursuit of the regular course of his business of selling tangible personal property. The defendant, State Tax Commission of Utah, in its Regulation S38, has recognized this point of law.

> "S38. Isolated and occasional sales (Applies to sales and use taxes). — Isolated or occasional sales made by persons not regularly engaged in business are not subject to the tax. Under this rule no sale is taxable if it is not made in the regular course of a business of a person making retail sales as defined in Regulation No. S27. The word 'business' as thus used refers to an enterprise engaged in making retail sales notwithstanding the fact that the sales may be few or infrequent."
>
> * * *
>
> "No sale of an article of tangible personal property made by a dealer in such type of property is considered to be isolated or occasional regardless of whether or not such article was used

> by such dealer in his regular business prior to the sale. For example, sales of electrical fixtures and appliances once used by an electrical dealer in his business are subject to tax. *On the other hand, the sale of fixtures and appliances used in a clothing store are not subject to tax when the merchant sells them in the course of his modernization program.*"*

The Commission's Regulation No. S27 also supports plaintiff's position because it limits a retail sale to a sale made by a retailer or wholesaler to a user or consumer, except for such sales as are defined as wholesale sales and are otherwise specifically exempted under the terms of the Act. The Commission in that same regulation proceeds to enlarge upon the meaning of "retail sale" by stating:

> " . . . It includes any transfer, exchange or barter whether conditional or for a consideration by a person doing business in such commodity or service, either as a regularly organized principal endeavor or as an adjunct thereto. *The price of the service or tangible personal property, the quantity sold, or the extent of the clientele are not factors which determine a sale to be or not to be a retail sale.*"*

As stated in that regulation, the price of the service or tangible personal property which is sold is not relevant in determining whether the transaction is isolated or occasional, nor are the quantity sold or the extent of the

*Emphasis ours

clientele factors in such determination. The fact that there was a substantial amount of property sold by Amis Construction Co. at the Atlantic City sale or the fact that L. A. Young Sons Construction Company was only one of a number of purchasers at the sale can, therefore, have no bearing on this case as acknowledged by the Commission's own regulation. What is important here is not how much was sold nor to how many persons, but rather whether Amis Construction Co. was a retailer making a retail sale in the regular course of its business. The facts speak eloquently that such is not the case.

The defendant Commission has further supported plaintiff's case by enacting its Sales Tax Regulation No. S60 which states as follows:

> "S60. Machinery, fixtures and supplies sold to manufacturers, business men and others (Applies to sales and use taxes). — Sales of machinery, tools and other equipment to a manufacturer, producer or contractor and sales of furniture, fixtures, supplies, stationery, equipment, appliances, tools and instruments to stores, shops, businesses, establishments, offices and professional people for use in carrying on their business or professional activities are taxable. *Such sales are to the final buyers or ultimate consumers and are not sales for resale.*"*

*Emphasis ours

As noted in this regulation, the sale of equipment to contractors is not a sale for resale and the Commission, therefore, imposes a tax on the purchase of this original equipment. Had Amis Construction Co. purchased this equipment from a retailer within the State of Utah, it would have paid a Utah sales tax because the defendant, State Tax Commission of Utah, has taken the position that such a sale is not for resale, but is a sale to a final buyer or ultimate consumer. This being the fact, the Commission should not be allowed to now reverse itself and say that the sale of original equipment was not really to a final buyer, but rather for resale. If the Commission considers a used equipment sale by a contractor to be a part of its regular course of business and constitutes a retail sale, then the commission should not be entitled to collect a sales tax upon the original purchase of that equipment.

The facts in this case are that the regular course of business of Amis Construction Co. was and is that of constructing highways, roads and bridges. Amis Construction Co. was not at the time of this transaction, nor has it ever been, involved in making retail sales. In its fifty year history, it has held only two equipment sales. This certainly is isolated and occasional. Amis Construction Co. has never held a sales tax license and has never purchased equipment for resale. Under the Commission's Regulation S38, its own example illustrates the non-taxability of the subject transaction. By illustration the Commission says that the sale of fixtures and appliances

used in a clothing store are not subject to tax when the merchant sells them in the course of his modernization plan. By this same measure, a lawyer or judge need not pay a sales tax if he decides to sell his desk or chairs; he is not involved in making a retail sale. Likewise, in the case at bar, a contractor need not collect nor the purchaser pay a sales or use tax on the sale of used construction equipment which it sold in its modernization program. It was just such situations that the legislature had in mind when it enacted the isolated or occasional sale exemption.

This court, in *Geneva Steel Co. v. State Tax Commission,* 116 Utah 170, 209 P. 2d 208, cited with approval similar regulations of several other states upholding the position L. A. Young Sons Construction Company asserts here.

"Ohio's regulation furnished this example:

> "'Where a person sells his household furniture; where a farmer sells his farm machinery, or other farm equipment; or where a grocer sells his cash register, counters, or other store fixtures at auction or otherwise, such persons are not 'engaged in the business' of selling tangible personal property at retail with respect to this property, but are making casual or isolated sales.'

> "Under Art. I of the Illinois regulation the selling of tangible personal property as machinery and other capital assets by a retailer which he has used in his business and no longer needs, and which he does not otherwise engage in selling as a part of his regular business is an isolated and occasional sale.
>
> "The above regulations, as well as those of other states which we have examined, definitely contemplate an isolated or occasional sale as one made by a person while not in the pursuit of the regular course of his business of selling tangible personal property. . . "

The case presently before he court is directly in point. Certainly the sale of construction machinery by a contractor is the same as a sale by a farmer of his farm machinery. The facts disclose that the equipment sold by Amis Construction Co. had been used in its business and was no longer needed. It was not sold as a regular part of Amis' business. The plaintiff, therefore, urges this Court that the subject transaction was isolated or occasional under regulations of the defendant and under the statute providing such an exemption as this Court has interpreted the same.

POINT II

THE ISOLATED OR OCCASIONAL SALE EXEMPTION CONTAINED IN SECTION 59-15-2, UTAH CODE ANNOTATED, 1953, AS AMENDED, APPLIES

TO BOTH THE SALES AND USE TAX ACTS AND TO TRANSACTIONS BOTH WITHIN OR WITHOUT THE STATE OF UTAH.

The Legislature in defining "retail sale" has categorically stated that it is not intended to include isolated nor occasional sales. This exemption has been a part of the Sales Tax Act since its inception and has been recognized both by the State Tax Commission of Utah and this honorable Court as being a valid exemption. Perhaps the most persuasive and explicit case on the isolated or occasional sale provision is that of *Union Portland Cement Co. v. State Tax Commission,* 110 Utah 152, 176 P. 2d 879. In this Court's original opinion reported at 170 P. 2d 164, the Court held that the use tax was separate and distinct from the sales tax and that the exemptions found in the sales tax did not necessarily exist as exemptions in the use tax. Upon rehearing, the Court completely reversed is position in that respect. The Court quoted extensively from the Third Biennial Report (1935-1936) of the State Tax Commission of Utah in which the Commission pointed out that some Utah merchants were suffering as a result of the sales tax, particularly in those areas near the borders where residents of the state could go over into another state and purchase items without the sales tax and bring them back into Utah. The Commission went on further in its Biennial Report to note that other states had passed use tax laws which had the effect of imposing a tax on goods coming

into the state for use and upon which the state sales tax had not been paid. In 1937 the Utah State Legislature obliged the State Tax Commission of Utah by passing the Utah Use Tax Act which was passed in a form not as an amendment to the Sales Tax but as a separate Chapter. In so doing, the Legislature did not reiterate in the use tax all the exemptions available under the Sales Tax Act and since that date the Legislature has not seen fit to amend both acts each time it has amended one. This Court took further note that the State Tax Commission of Utah was also aware of the uncertainties of the law and, therefore, the Commission administered the two laws as though they were one; and when the sale of certain property was exempted from the sales tax, it was also exempted from the use tax. The Court pointed out that in its Fourth Biennial Report (1937-1939) the State Tax Commission of Utah reported to the Legislature that it had been so administering the two taxes. The Legislature, however, did not amend the acts to bring them into correlation, and the Court stated as follows:

> "The legislature did not change the Use Tax Act as the commission recommended. One of two conclusions can be drawn from this non-action. Either the legislature did not intend the property exempted from the sales tax to be exempted from the use tax, or the legislature intended the specific exemptions to the sales tax to also be exemptions to the use tax and did not consider amendments necessary to carry out that intent as the Tax Commission was already applying the law as so intended.

> "The second of the two conclusions is the reasonable and correct one."

Thus, having arrived at this conclusion, the Court held in that case as follows:

> "From the legislative history of the Sales and Use Tax Acts and from the administrative interpretations thereof made with the knowledge and implied approvad of the legislature, it follows rather conclusively that the Sales and Use Tax Acts are to be considered as correlative and complementary and that, as far as exemptions are concerned, legislative created specific exemptions from the sales tax are also to be treated as exemptions from the use tax."

It is also interesting and important to this case now before the Court to take a look at the facts in that *Union Portland Cement Case*. The Utah Legislature had amended the sales tax in March of 1943 and exempted sales of industrial coal from the Sales Tax Act. The coal was sold in Wyoming and then brought into Utah for use. The State Tax Commission of Utah took the position that the use tax applied to this transaction. The Court held that:

> " . . . *Such an interpretation would discriminate against coal brought out of the state in favor of coal purchased in the state. The use tax was not intended to create a discrimination against out-of-state merchants in favor of Utah merchants.** Rather it was passed, as indicated by the above quotation from the Third Biennial Report of the

*Emphasis ours

Tax Commission, to remove the theretofore existing discrimination against local merchants in favor of out-of-state merchants which discrimination arose from the operation of the sales tax. The Tax Commission itself clearly stated the purpose of the use tax on page 39 of its Fourth Biennial Report. It said:

> 'The Use Tax Act was passed by the last legislature and became effcetive July 1, 1937. This Act was passed as a companion measure to the sales tax and acts as a complement to it.
>
> 'The purpose of the tax was to overcome a discrimination found to exist in the sales tax . . . caused by the inability to impose the sales tax upon transacions in interstate commerce . . . The tax applies primarily to goods shipped into the State in interstate commerce and to purchases made outside the State for use within the State, and in this manner acts as a protection and equalization to the Utah merchant against out-of-state merchants who may be selling to Utah purchasers.'

"Legislative-created specific exemptions from the sales tax are also exemptions to the use tax *regardless of where the sale of the property involved took place.*"*

*Emphasis ours

Continuing on, the Court stated:

> ". . . As before stated, the obvious purpose of the Use Tax Act was to impose a tax on the use in this state of property, the sale of which, because that sale took place outside the state, was beyond the reach of the Utah Sales Tax Act. But when the legislature by the specific language of the Sales Tax Act carves out of those sales which it has power to tax specific sales and exempts them from the sales tax it clearly evidences a desire to exempt the property so sold from the 2% tax, whether imposed by the Use or Sales Tax Act. To hold otherwise would practically nullify the obvious legislative intent."

This case appears to me to be on all fours with the case now before the Court. The trasaction was a sale made in Wyoming, which, if it had been made in Utah, would not be subject to the Sales Tax Act and likewise would not be subject to the Use Tax Act. Like the sale of the coal in Wyoming which came under an exemption of the Sales Tax Act, the sale of this equipment in Wyoming also comes under an exemption to the Utah Sales Tax Act and is, therefore, not subject to the Utah Use Tax.

The defendant has raised the question as to the status as an exemption of the "isolated or occasional" sale provision — thus raising the question as to whether the isolated or occasional sale provision is an "exemption" within the purview of the *Union Portland Cement Co.* decision. This Court has clearly answered this ques-

tion in *Geneva Steel Co. v. State Tax Commission,* 116 Utah 170, 209 P. 2d 208. There the War Assets Administration had sold its Geneva plant to United States Steel and the Utah Tax Commission assessed a use tax against Geneva Steel Company, based on the purchase price of the plant. Geneva Steel Company defended the suit on the basis that the sale was an isolated or occasional sale and hence not a retail sale upon which there is a tax imposed. The Court again went back to the *Union Porland Cement Co.* case, citing the legislative history and affirming the Court's prior determination that the Use and Sales Tax Acts are complementary. The State Tax Commission of Utah made its argument as follows:

> "The defendant argues that inasmuch as the sales tax is imposed upon 'every retail sale of tangible personal property,' the tax is in fact not imposed upon a transaction which is an isolated or occasional sale for the reason that it is not a retail sale as defined by the statute and, therefore, it is an 'exclusion' and not a 'specific exemption' as dealt with in the *Union Portland Cement* case. The defendant draws a distinction between sales, on the one hand, which it claims are retail sales, but exempt from the tax, e.g. sales to or by religious or charitable institutions and sales of industrial coal, and sales, on the other hand, which are non-retail sales because they do not come within the definition of a retail sale in 80-15-2 (e), U.C. A., 1943, as amended, by Chapter 92, Sec. 1, Laws 1943, quoted supra, e.g. isolated or occasional sales. There is no merit in this argument. At least for the purpose of integrating the use and sales tax acts no distinction exists between sales which

> the defendant calls 'exempted' and sales which it calls 'excluded.' The use tax does not apply in either instance. . . ."

The Court went on further to state as follows:

> "There is no valid distinction between sales which are not retail sales because *excepted* from the definition of the term 'retail sale' and sales which are not retail sales because they are *not included* within that term. A further proof that the legislature intended isolated or occasional sales made within this state not to be subject to the use tax is manifested in the fact that the 1949 session of the Legislature amended the definition of a 'retail sale' in the sales tax act to provide that 'no sale of a motor vehicle shall be deemed isolated or occasional for the purposes of this act.' Laws 1949, c. 83. Had the isolated or occasional sale of a motor vehicle within this state prior to this amendment been subject to the use tax, there would have been no point in enacting the amendment as both the sales and the use tax are imposed at the same rate."

It is evident from teh foregoing that the "isolated or occasional sale" provision applies to the Use Tax Act.

Although in the *Geneve Steel* case this Court went on to say that it expressed no opinion as to whether isolated or occasional sales made outside of this state are subject to our use tax, it has subsequently answered this question. In the case of *Barrett Investment Company v. State Tax Commission*, 15 Utah 2d 97, 387 P. 2d 998, the State Tax

Commission of Utah imposed a deficiency use tax assessment on an out-of-state purchase of parts of machinery and equipment which became component parts of a ski lift erected near Brighton, Utah, and upon which parts no sale or use tax had been paid. The plaintiff in that case used the argument that since the parts were to be used in building the ski lift and the sales tax would be charged on the purchase of tickets to ride on the ski lift, then the items purchased out of state were not subject to the use tax because it was property which was to become an ingredient or component part of the ski lift. Again, this Court pointed out and reaffirmed its decision in the *Union Portland Cement* case that the Sales and Use Tax Acts are correlative and complementary to each other. The Court then stated:

> ". . . The use tax act was enacted so as to avoid competition and discrimination against purchase of goods subject to the sales tax and the use of similar goods within the state which would not be subject to the sales tax because the transactions involved interstate commerce or because, as in the instant case, the purchasers went outside the state to buy the goods but used them within the state. The sales and use tax acts being complementary to each other the exemptions therein should be construed so as to effectuate the same purpose, that is, if a purchase of tangible personal property is exempt under one act it should be exempt under the other and vice versa."

The Court recognized that had the exemption provisions of the Sales Tax Act pertaining to tangible personal

property been applicable, the property would not have been subject to the use tax. This is likewise true in the case now before the Court. If the transaction is not subject to the sales tax because of the isolated or occasional sale exemption, then likewise it is not subject to the use tax. The test that this Court applied in the *Barrett Investment* case is not whether the transaction took place in or out of the State of Utah, but whether the exemption applicable to the sales tax applies to the sale, regardless of where it took place. If the exemption applies to the particular sale, then it applies to the use tax and no tax is assessable.

Perhaps of even more persuasiveness on this point is the case of *Ogden Union Railway and Depot Co. v. State Tax Commision,* 16 Utah 2d 255, 399 P. 2d 145. There this Court, for the purpose of allaying the fear that its initial opinion in the case could be misinterpreted, stated:

> ". . . Since the above apprehension exists and also since our prior opinion might be interpreted as indicating that certain transactions would be subject to use tax because not expressly exempted by that act, whereas, the same transactions, if they occurred within the state, would be exempt under the Sales Tax Act, we granted the rehearing to correct any uncertainty that exists in that regard.
>
> "In reference to this problem, it is appropriate to consider the background and the relationship of the two acts. The sales tax was en-

> acted in 1933, imposing a tax on all sales of personal property within the state. See Title 59, Chap. 15, U.C.A. 1953. After several years' experience under this act, it was found that in numerous instances, items of personal property, particularly expensive things such as automobiles and farm machinery, were purchased outside the state to avoid the Utah sales tax. It was to get rid of this tax evasion, to prevent loss of business to Utah merchants in border areas, and to tax uniformly all personal property when it was first put to use in this state, whether purchased in Utah or elsewhere, that the Use Tax Act was passed in 1937. See Title 59, Chap. 16, U.C.A. 1953. It would seem anomalous if a commodity were exempted by the Sales Tax Act, and thus not being subject to that tax, would then be caught by the use tax. Because these two acts are closely related and complementary to each other, it seems both logical and fair that exemptions under the Sales Tax Act should also apply under the Use Tax Act. . . ."

The facts of the case were that the Ogden Union Railway and Depot Company purchased coal in Wyoming and used it in its depot business in Ogden, Utah. Thus, it is clear that this Court has recognized the position asserted in this case by the plaintiff that an out-of-state transaction on which a use tax is asserted is as much entitled to an available exemption as the same transcation would be had it occurred within this state.

We submit that from the foregoing authorities the Court should determine that the isolated or occasional

sale exemption applies to the Use Tax Act whether the sale is made within or without the State of Utah.

CONCLUSION

The decision of the State Tax Commission of Utah, imposing a use tax on the plaintiff is in error and should be reversed. The transaction involved in this case was isolated or occasional and thus not subject to the tax imposed.

Respectfully submitted,

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